DEPARTMENT OF JUSTICE

INTERNATIONAL ANTITRUST: A REPORT FROM THE DEPARTMENT OF JUSTICE

Address by

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It is again a pleasure to be here at Fordham to speak at what has become perhaps the most important forum in the world for international antitrust. I welcome the opportunity as well to be able to report back on the events of this past year and to highlight for you some of the accomplishments that have taken place in such a brief period of time. Last year I described for you our priorities and goals; this year I am fortunate to be able to report to you on the reality of our accomplishments, as well as to describe our goals for the coming year.

As I emphasized last year at this same conference, parochial notions of antitrust enforcement have been rendered meaningless by the expanding global economy. As U.S. companies continue to enlarge their operations into markets around the world, and foreign firms continue to invest in the American market, international competition and the role of international antitrust enforcement has become a matter of critical importance. This is why the Division has expended substantial resources during this past year in the area of international antitrust, both on policy initiatives and on enforcement matters. This morning, I will describe the highlights of our initiatives in both these areas.

Although billed as an Introduction to the Revised International Guidelines, I would like to expand slightly on the topic. After giving you a brief overview of our draft Guidelines, I will then turn to several examples of mutual assistance and enforcement cooperation that have occurred this year, and finally to our exciting and successful effort in the Congress to pass legislation that will facilitate future efforts in our continuing goal of "internationalizing" antitrust enforcement by combining the energies, efforts and abilities of the diverse enforcement entities throughout the world in cooperative efforts aimed at addressing anticompetitive conduct in an increasingly global economy.

1. The 1994 Joint International Antitrust Guidelines

As I mentioned in my speech to you last year, one critical aspect of our goal to facilitate effective international antitrust enforcement was a reconsideration of the 1988 Antitrust Enforcement Guidelines for International Operations. We had already reaffirmed our commitment to continue the policy announced by former Assistant Attorney General Rill that revoked footnote 159 of the 1988 Guidelines, but there was plainly more work to do.

Shortly after the Fordham speech, the Division, under the direction of Diane Wood, the Deputy Assistant Attorney General for International Affairs, began in earnest to reexamine carefully the 1988 Guidelines. We quickly reached the conclusion that they no longer accurately reflected the law or the Division's policy in several important areas of antitrust enforcement. For example, the 1992 Joint DOJ-FTC Horizontal Merger Guidelines superseded the merger analysis in the 1988 Guidelines, and my revocation of the 1985 Vertical Restraint Guidelines drew into question some portions of the 1988 Guidelines' analysis of vertical restraints. The Supreme Court's decision in *Hartford Fire Insurance* also indicated that a new look at jurisdiction and comity was in order. For these reasons, the Division concluded that its 1988 Guidelines were no longer fully reliable as a source of guidance to practitioners and multinational businesses on the subject of the government's prosecutorial policies in the area of international antitrust law.

Concluding that revisions were in order, the Division next considered whether to keep the encyclopedic treatment of a wide variety of antitrust subjects within the "guidelines for international operations," or whether to limit the International Guidelines to those issues that were peculiarly or uniquely implicated by the enforcement of antitrust in the international arena. We decided to narrow the scope of the Guidelines and restrict their contents to those issues of special importance to international antitrust enforcement. Merger

analysis, intellectual property licensing, and other general substantive issues are covered in existing or proposed guidelines, as well as speeches and other official enforcement statements.

Having decided on the scope of the revised Guidelines, we then began the task of drafting new International Guidelines under the leadership of the Deputy Assistant Attorney General for International Antitrust, Diane Wood. Over the course of several months, and with the invaluable assistance of the Division's Foreign Commerce Section, a task force composed of attorneys and economists from within the Division, worked diligently on drafting the Antitrust International Enforcement Guidelines for International Operations of 1994. Significantly, after a series of meetings and exchanges of drafts between the FTC staff and the Division, the Commission voted to join in the draft Guidelines. On October 13, 1994, the Department and FTC sent the draft International Guidelines to the Federal Register for publication and a 60 day period for public comment. On Wednesday, October 19, 1994, the Federal Registered published the draft Guidelines. They can be found in Volume 50, No. 201, beginning at page 52810. In addition, for those of you are already travelling on the information superhighway, you can find the Guidelines on the Internet at "gopher@ justice.usdoj.gov". I invite all of you, and other interested persons, to read the draft 1994 Guidelines and to provide us with your thoughts and comments. If you would like to send your comments via the internet, our address is "antitrust@ justice.usdoj.gov".

Before examining the specific contents of the new Guidelines, I want to state how delighted I am, and how critically important it is, that the FTC participated in drafting and voted unanimously to join these revised International Guidelines, so that they represent the views of both the Department of Justice and the Commission. As sister agencies in most areas of international antitrust enforcement, the fact that these Guidelines are issued from both Agencies substantially enhances their utility to foreign enforcement agencies,

international antitrust practitioners and multinational businesses. In addition, these Guidelines benefitted greatly from the invaluable advice, contributions and input of officials representing other Executive Branch agencies. The result of this intragovernmental collaboration improved the draft 1994 Guidelines immeasurably and we are grateful for the assistance of all who reviewed earlier drafts so carefully.

Given that they have been in the Federal Register for only slightly more than one week, many of you may not have had an opportunity to review the revised Guidelines. I would, therefore, like to outline briefly the major subjects covered in the draft Guidelines and then comment briefly on them.

The 1994 Guidelines reflect the Department's continuing commitment to provide guidance and predictability regarding the enforcement of the antitrust law in an ever more global economy. In 1977, the Department issued an Antitrust Guide for International Operations. That Guide summarized the law and the Division's policies on various international matters and illustrated those legal and policy issues with hypothetical case examples. From 1986 to 1988, the Department undertook a wholesale revision of the 1977 Guide, culminating in the publication of the 1988 Guidelines. The 1994 International Guidelines continue that tradition.

As I noted before, the 1994 Guidelines are intentionally narrowed and address only those aspects of the antitrust laws that are of special relevance to the Agencies' international jurisdiction and their exercise of prosecutorial discretion. This includes:

(a) subject matter jurisdiction over conduct occurring and entities located wholly or partially outside of the United States and the considerations, issues, policies and processes that govern our decision to exercise that jurisdiction;

(b) comity and the factors included in the Agencies' analysis of that principle;

(c) mutual assistance in international antitrust enforcement, including the unique aspects of international discovery;

(d) the effects of foreign governmental involvement on antitrust liability of private entities, including the doctrines of sovereign compulsion and acts of state; and,

(e) the relationship between antitrust law and international trade measures.

Like their two predecessors, the draft 1994 Guidelines also intersperse illustrative examples with the discussion in the text in order to assist readers in understanding how these principles may operate in specific factual settings.

Those of you who have had time to read the 1994 Guidelines and compare them with the 1988 version will note some differences. For example:

(a) The 1994 Guidelines include a discussion of subject matter jurisdiction and comity in light of the Supreme Court's recent decision in *Hartford Insurance*;

(b) The 1994 Guidelines restate our view of the appropriate scope of the doctrine of sovereign compulsion, making it applicable only to conduct that occurs within the foreign government's own territory;

(c) The 1994 Guidelines expand significantly on the relationship between trade statutes and antitrust laws;

(4) The 1994 Guidelines place a new (and, as I will discuss shortly, a timely) emphasis on the importance of cooperative multinational antitrust enforcement and the facilitation of cooperative discovery efforts; and, finally,

(5) The 1994 Guidelines constitute a joint statement of enforcement intentions by the Department and the Federal Trade Commission.

I would be remiss, however, to focus only on the differences between the 1988 and 1994 Guidelines, when there are such striking similarities, not only in the overall purpose, but also in the underlying philosophy contained in the two. Certain guiding principles of international antitrust enforcement policy include:

(a) First, that the Agencies should protect consumers by vigorously enforcing the antitrust laws to the full extent of the jurisdiction conferred by Congress, while at the same time remaining sensitive to and expressly taking into account the sovereignty concerns and the legal and economic policies of foreign governments; and,

(b) Second, that the Agencies should develop strong, cooperative enforcement relationships with foreign antitrust enforcement officials, in order to improve our mutual ability to enforce the competition regulations of our respective jurisdictions.

Thus, despite some changes in the substance of the two Guidelines, the basic building blocks of international antitrust enforcement remain unaltered. In fact, as my next subject demonstrates, this past year has seen enormous strides made in terms of effective coordination and cooperation between the Department and our counterparts abroad. As these examples demonstrate better than anything else I could say, cooperation between countries -- each enforcing the law in their respective jurisdictions -- enhances the efficiency of our efforts, ensures for our respective governments the most effective enforcement possible, and ensures for the consumers in this global economy the optimal market for goods and services.

2. International Coordination and Cooperation in 1994

I am pleased to be able to discuss several different examples of our effective cooperation with competition agencies throughout the world that have taken place in the last year. Certainly, in one of the most publicized cases of the year, the *Microsoft* investigation, we worked closely with DG IV of the European commission in negotiating a settlement and consent decree. The outcome obtained clearly demonstrates the mutual benefits that can be achieved through cooperative enforcement efforts. The Division and DG IV each contributed a unique and critical component to the successful resolution of that case. Without working cooperatively in this matter, I do not believe that the outcome obtained would have been as quick and efficient as it was. Our cooperation was possible only because the defendant, Microsoft, requested a single, cooperative settlement procedure and waived its rights to confidentiality under both laws. After virtually round-the-clock negotiations on two continents, we emerged with an undertaking by Microsoft with the EU and a proposed consent decree with the Department of Justice that will, I believe, permit effective competition to emerge in the market for personal computer operating software and will ensure a level playing field to any company that seeks to compete against Microsoft in the future.

Not only was this year highlighted by the successful international cooperation in Microsoft, it was also remarkable as a year in which the Division obtained guilty pleas in two different cases to criminal price-fixing as a direct result of the mutual legal assistance treaty between the United States and Canada. In July, in a truly joint prosecution with the Canadians, the Department announced that it and the Bureau of Competition Policy had uncovered and broken up a $120 million a year international cartel in the fax paper market that had inflated prices of thermal fax paper by approximately ten percent. In a second case, also prosecuted with the cooperation and assistance of the Canadians (including the Royal

Canadian Mounted Police), the Division successfully challenged a conspiracy in the $100 million market for plastic dinnerware. As you can see from these numbers alone, the direct adverse impact on consumers in Canada and in the United States from these cartels was substantial and our cooperative efforts benefited directly those persons whom the antitrust laws were intended to protect.

Without the cooperation and mutual assistance of the Canadian Bureau of Competition Policy and other agencies of the Canadian government, the Department would not have been able to prosecute these illegal conspiracies effectively, because key evidence of the conspiracy was located in Canada and beyond the reach of our investigative capabilities. Similarly, important and confidential evidence in the hand of the United States Department of Justice was instrumental in allowing the Canadians to prosecute their case against the fax paper conspirators. We are greatly indebted to the Canadians for their assistance and look forward to further mutual enforcement efforts in the future. As these examples demonstrate, working cooperatively in the area of international antitrust enforcement is a win-win situation: It directly enhances the efficacy of each country's antitrust enforcement efforts to the benefit of each country's own citizens and consumers. International price-fixing conspiracies that harm consumers in many countries are wrong, and all of in law enforcement have direct and fundamental responsibility for prosecuting those responsible. Often only joint cooperative efforts make such prosecution possible.

Finally, in two merger investigations, the Division received invaluable assistance and cooperation from enforcement officials in the United Kingdom and German. We worked with the UK antitrust authorities on the investigation that concluded in a suit and consent decree surrounding the partial acquisition and joint venture between British Telecommunications, Plc. and MCI Communications Corp. As set forth in that decree, the parties agreed to terms that (a) prohibit discrimination against U.S. carriers in offering

multinational communication services by requiring the filing of published rates and terms for access to the BTI network, (b) that restrict BT from providing MCI with proprietary or pricing information regarding U.S. competitors and, (c) that BT not bypass the existing regime for international telecommunications until other international carriers, such as AT&T and Sprint can do as well and obtain access to BT's network.

The Division also received invaluable assistance from our sister enforcement agency in Germany in our investigation and ultimate challenge to the proposed acquisition of General Motor's Allison Transmission Division by ZF Friedrichshafen. The merger was investigated by the German Cartel Office as well. This merger presented the first in which the Division used a technology market to block the acquisition of production assets and signals the Division's commitment to protect competition in technology markets, which are vitally important in today's global marketplace.

3. International Enforcement Assistance Act of 1994

Our successes in the two criminal cases were directly linked to our assistance treaty with Canada relating to criminal matters. More broadly, this experience showed that effective international antitrust cooperation rests on our ability to exchange information and documents among antitrust enforcement agencies. The Division, therefore, made it a priority to seek legislative authority to facilitate the cooperative exchange of critical information between enforcement agencies located throughout the world. In pursuit of that goal, we worked with representatives of the Congress, the bar and the business community to draft a bill entitled the International Antitrust Enforcement Assistance Act of 1994 (what I will call "the International Cooperation Bill.") Attorney General Reno enthusiastically supported our proposal and substantially identical bills were introduced in the House and the Senate on July 19, 1994.

I am gratified to be able to report to you that due to the tremendous effort of these individuals and the unqualified support of a bipartisan coalition of lawmakers -- including Senators Metzenbaum and Thurmond and Chairman Brooks and Congressman Fish -- the International Cooperation Bill received final passage by the United States Congress on Saturday, October 8, 1994, and we hope and believe it will be signed by President Clinton in the near future.

The bill, which was originally modelled on legislation enacted in 1988 and 1990 to help the Securities and Exchange Commission obtain foreign located evidence, will allow the Department and the FTC to obtain evidence already in the files of foreign antitrust enforcement agencies or in the possession of persons in their territory by permitting these agencies to offer the same kind of assistance on a reciprocal basis to foreign antitrust investigators. Under the bill, such assistance requires a written agreement between the United States and foreign agencies, entered into after public notice and comment.

Specifically, the bill permits the Department and the FTC to exchange otherwise confidential investigative information with foreign antitrust authorities where this will be in the public interest of the United states and where it satisfies the important confidentiality and other safeguards outlines in the statute. In addition, the International Cooperation bill authorizes the Department and the FTC to obtain information from firms or individuals in the U.S., on behalf of foreign antitrust authorities, either by using their respective civil investigative powers or, in the case of the DOJ, by going to court and seeking an order compelling the production of evidence.

While notable progress has been made in the past decade toward more antitrust cooperation between the United States and other countries through a series of bilateral agreements, it is evident that greater convergence in antitrust enforcement will only be

achieved by continued progress in the areas of mutual assistance and procedural reciprocity. It is these two goals toward which the International Cooperation bill was specifically directed.

For these provisions to be enforceable, the foreign antitrust agency seeking the cooperation of the U.S. agencies must have entered into a mutual assistance treaty with the U.S. government. They must be prepared to give assistance that is comparable in scope to that provided by the U.S. agencies. And, to protect confidential information from possible misuse or improper disclosure, the Act requires that assistance to foreign authorities be pursuant to public disclosure and comment, that the foreign antitrust authority can and will meet the confidentiality requirements no less than those presently imposed upon U.S. antitrust agencies, that the use of any information provided be restricted to antitrust enforcement (or in certain cases, other law enforcement purposes) and that the mutual assistance agreement be terminated if there is a breach of confidentiality unless adequate steps are taken to minimize the harm and ensure that it will not recur.

Two important exclusions on the exchange of confidential information are contained in Section 5 of the Act. Materials obtained solely by a party's compliance with the pre-merger notification provisions of the Hart-Scott-Rodino Act are expressly excepted from the Act, as is classified national security information. In addition, the Act makes clear that confidential grand jury information may be released pursuant to a court order under Rule 6(e) of the Federal Rules of Criminal Procedure, upon a showing of particularized need.

Passage of this bill took place ten weeks after it was first introduced -- possibly a record for antitrust legislation that I attribute to the powerful bipartisan support that it received. In the House, the legislation was sponsored by Congressman Brooks, Chairman of the Judiciary Committee, and ranking Judiciary Committee member Congressman Fish.

In the Senate, the bill was sponsored by Senators Metzenbaum and Thurmond, with co-sponsorship by Senators Biden, Kennedy, Leahy, Simon, Hatch, Simpson, Grassley and Specter. In the legal community, the bill enjoyed the strong and active support of the former Assistant Attorney General of the Antitrust Division, James Rill, and the Antitrust and International Law Sections of the American Bar Association. A number of major United States corporations including American Airlines, Apple Computer, Bethlehem Steel, Chrysler, Inland Steel, USX, Viacom and Xerox also supported the legislation.

Our hope for the near future is that other countries will soon adopt legislation or administrative rules that allow their antitrust enforcement agencies to enter into reciprocal mutual assistance agreements with the Department of Justice and the Federal Trade Commission.

In the twelve months since I first spoke with this group, the Division is proud that we have been able to continue to build upon the accomplishments of the Bush Administration, led by former Assistant Attorney General James Rill, in the area of international antitrust enforcement. As I have said on many other occasions, and as our experience here so clearly demonstrates, strong antitrust enforcement is a continuing commitment of the United States government, and is, as it should be, wholly non-partisan and bi-partisan. I am extremely pleased with the Guidelines and look forward to the public's response to them. We are proud of the accomplishments of the Division, in both civil and criminal cases, that are the direct result of a growing spirit of cooperation and mutual assistance in the international antitrust enforcement community. And, I look forward to the prospect of facilitating even greater cooperation in the future through the implementation of the International Cooperation Bill.